90-1 22

No. _____

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRYANT JAMES SALDIVAR,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITION FOR WRIT OF CERTIORARI

BRUCE M. MARGOLIN
MICHAEL D. CHANEY

JOSEPH PATRICK FARNAN
Counsel of Record

8749 Holloway Drive
Los Angeles, California 90069
(213) 652-0991

Attorneys for Petitioner
BRYANT JAMES SALDIVAR

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

1. What is the extent to which irrelevant evidence can contribute to a defendant's conviction under the United States and California Constitutions?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES. iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT. 7

1. Petitioner was deprived of due process of law by the admission of irrelevant evidence at his trial 7

CONCLUSION. 10

APPENDIX A

OPINION, CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN, FILED JANUARY 18, 1990. . . . . A-1

APPENDIX B

ORDER DENYING REVIEW, CALIFORNIA SUPREME COURT, FILED APRIL 18, 1990 . . . . . B-1

TABLE OF AUTHORITIES

Page

Cases

Bruton v. United States (1968)
391 U.S. 123, 88 S.Ct. 1620,
20 L.Ed.2d 476 10

Spencer v. Texas (1967)
385 U.S. 554, 87 S.Ct. 648,
17 L.Ed.2d 606 10

Constitution

United States Constitution
Fourteenth Amendment 2

Federal Statute

28 U.S.C. section 1257 2

State Statutes

California Evidence Code
section 350 7
section 352 7

California Penal Code
section 496 . . . . . 1, 2
section 470 2
section 487 2

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

BRYANT JAMES SALDIVAR,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner Bryant James Saldivar respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Seven, entered in this proceeding on January 18, 1990, petition for review denied by the California Supreme Court on April 18, 1990, affirming petitioner's conviction for receiving stolen property in violation of California Penal Code section 496.

OPINION BELOW

A true and correct copy of the unpublished opinion of which review is sought appears herein as Appendix A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257 on the ground that his rights under the Fourteenth Amendment to the U.S. Constitution were violated.

The California Court of Appeal entered its order rejecting petitioner's claim on January 18, 1990.

The California Supreme Court denied review in this case on April 18, 1990. The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL PROVISION INVOLVED

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was charged by information with violation of California Penal Code sections 487, 496, and 470 — grand theft, receiving stolen property, and forgery — based upon the following facts:

Carol Ann Gratzke worked for the Cherokee Apparel Corporation as a controller in 1986.

In 1986, Gratzke supervised an accounts payable clerk named Alfredo "Freddie" Legaspi. Legaspi took

care of all payments to Cherokee subcontractors. Sewing contractors were paid out of a specific bank account located in Denver, Colorado. Checks cashed against that account would usually be returned six weeks later to Cherokee to be reconciled with the bank statement and ultimately reviewed by Ms. Gratzke.

Legaspi quit Cherokee Apparel in late January 1987. However, before he quit, two checks were made out to one of Cherokee's sewing subcontractors, Jon Lee, out of the Denver bank account. The checks were made payable to "J.K. Apparel," the company owned by Jon Lee. Cherokee Apparel received no goods from Mr. Lee for these duplicate payments.

Ms. Gratzke later investigated another check dated January 9, 1987 issued through Freddie Legaspi. She discovered that it had been a duplicate check issued for goods which had never been received by Cherokee. This check, however, was payable to a different sewing subcontractor, Richard's Sportswear, which Mr. Pedro Del Valle owned.

In September 1987, the August bank statements revealed five or six payments issued on the same check number. Ms. Gratzke investigated the matter and discovered that these checks were fraudulent.

Ms. Gratzke investigated three more checks. All three checks were based on duplicate invoices and paid to Richard's Sportswear for goods never received. The signatures on two of these checks included the forged signature of Ms. Gratzke. The endorsement on the back of these two checks did not appear to belong to Pedro Del Valle, the owner of Richard's Sportswear.

Ms. Gratzke also investigated five other checks. All of these checks were made payable to Richard's Sportswear dated in July and August 1987. Cherokee

Apparel's bank paid on all of these checks, which Ms. Gratzke determined were fraudulent. Her signature on all of these checks was forged and the checks themselves were counterfeit. Pedro Del Valle's signature endorsing these checks also appeared to be forged.

Once Ms. Gratzke became aware of the problem in mid-September concerning these fraudulent checks, she notified the Colorado bank of the problem. Two other fraudulent checks to Richard's Sportswear were not paid by the bank. Finally, Ms. Gratzke found among these checks another check payable to petitioner's company, Interamerica Financial Corporation for $250,000.00. Cherokee Apparel did not do business with petitioner's company and received no goods or services from petitioner's company in exchange for the $250,000.00. Ms. Gratzke's signature on the check was forged and the check itself was counterfeit. The cosigner's signature on the check, that of Mr. Raul Cruz, Vice-President of Finance, was also forged. The check was also coded with the same identification number found on the other counterfeit checks.

Ana Saralertsophon was employed by Los Angeles Quik Check Cashing service in 1987. In the course of her employment, she met Freddie Legaspi, who at the time was introduced to her as "Richard," the owner of Richard's Sportswear. She also met Chris Visperas, who "Richard" identified as his cousin from the Philippines who cashed checks for him. During August and September, Ms. Saralertsophon received seven checks from Visperas to cash for Richard's Sportswear. "Richard" would call Saralertsophon on the telephone prior to each delivery to advise her of the incoming checks. Ms. Saralertsophon cashed all of these checks.

After cashing one of these checks, the bank returned the check unpaid. After the check was returned,

Ms. Saralertsophon received another call from "Richard." He informed her that he would be sending his messenger to cash another check. Ms. Saralertsophon advised the owner of the call and when Visperas arrived, he was detained until the police arrived and arrested him.

On August 13, 1987, Anne Parker was employed as an operations officer for Rancho Bank in Upland, California. On that day, petitioner appeared at the bank and deposited into his Interamerica Financial Corporation account a check from Cherokee Apparel for $250,000.00. The bank placed a five-day hold on the deposit. On September 3, 1987, petitioner returned to the Rancho Bank again. A transfer of funds by wire to another bank was arranged.

Some time in early September 1987, petitioner appeared at the First Interstate Bank in Las Vegas and attempted to cash a cashier's check. Petitioner was referred to Judy Hornbuckle, the Assistant Vice-President. She refused to cash the check because petitioner was not a resident of the county and did not have an account there. On September 4, 1987, petitioner returned to the First Interstate Bank and collected $144,000.00 in cash that was received by wire from the Rancho Bank.

On September 21, 1987, Los Angeles Police Detective Cecil Dillard questioned Chris Visperas. Detective Dillard showed Visperas seven counterfeit checks that had been cashed and asked him if he had cashed them. Visperas admitted that he had done so and stated that he worked for Freddie Legaspi.

On February 4, 1988, Detective Dillard arrested petitioner and took him to the Ontario Police Department. Detective Dillard asked petitioner about the $250,000.00 check and petitioner stated that he had received the

check in the mail on the 14th or 15th of August 1987. Petitioner stated that he thought the check was a joke and was surprised and afraid at the same time.

Petitioner stated that he had called Wells Fargo Bank and the Mesa Bank in Colorado and learned from the Mesa Bank that the check was good for the amount stated. Petitioner also stated that he called Cherokee Apparel, and after being transferred to someone, he was told if he received the check from Cherokee payable to his company, then the check was good. Petitioner did not know the name of the person he spoke to.

Petitioner denied knowing Freddie Legaspi and admitted that he had deposited the check into his account and had spent the money on various things.

Petitioner also stated that he thought the check was a loan. Detective Dillard asked petitioner whom he thought the loan was from and petitioner stated that he did not know. Petitioner stated that a lot of people knew his company was about to fail. Petitioner also stated that he did not put the money in the bank because he would rather keep it himself.

Petitioner was convicted after jury trial of receiving stolen property only. He was sentenced to state prison. He appealed his conviction alleging, *inter alia,* that he had been prejudiced by the admission of irrelevant evidence at trial. The Court of Appeal rejected this contention. Petitioner petitioned for review in the California Supreme Court, alleging the same issues. His petition for review was denied. A copy of the order denying review is attached herein as Appendix B.

REASON FOR GRANTING THE WRIT

1. Petitioner was deprived of due process of law by the admission of irrelevant evidence at his trial.

Pursuant to California Evidence Code section 350, only relevant evidence is admissible. In the case at bar, a total of sixteen checks were admitted into evidence, only one of which was pertinent to the charges made against petitioner. Over constant objection by defense counsel, the trial court permitted the prosecution to introduce checks which had been counterfeited and forged by individuals not on trial in this case. Petitioner was not charged with any type of conspiracy to defraud, steal or counterfeit. He was simply charged as an individual with receiving stolen goods.

From the outset, after the jury was impaneled and before the trial began, defense counsel in chambers requested a conference and moved to exclude Exhibits 14, 15, 16, and 17, which consisted of various counterfeit and forged checks not at issue in this case. Defense counsel's argument was that the District Attorney was attempting to place into evidence exhibits on a conspiracy count that was not before the court, implicating the petitioner along with several other people who were not on trial. After defense counsel's objection that the items offered had no connection with the case and could not be proven by any evidence to be presented, the court denied defense counsel's request and ruled that the items offered were relevant to the case.

Thereafter, defense counsel's motion with respect to the items referred to was made under California Evidence Code section 352. Although the court specifically

made a finding that the evidence was probative, there was no discussion on the record of the prejudicial effect the evidence would have as contended by defense counsel.

When the evidence phase of trial began, defense counsel individually objected to the introduction of each exhibit, collectively numbered items 14, 15, 16, and 17.

With respect to Exhibit 14, which consisted of two duplicate invoices made by Freddie Legaspi, who was not on trial in this case, defense counsel objected as to the checks which were made as a result of the fraudulently made invoices on the basis that there was no connection whatsoever with the petitioner. The prosecution's offer of proof went to the fact that this was a double billing operation arranged by Mr. Legaspi and that the check that petitioner cashed was somehow part of this million dollar embezzlement scheme.

The trial court ruled that although the checks were remote in time from the check for which petitioner was being tried, the items were admitted as being relevant to show a connection between the different people. The prosecution failed to prove any so called "embezzlement" scheme involving Mr. Saldivar, which made the introduction of Exhibit 14 entirely erroneous.

The prosecution moved to admit Exhibit 15, which consisted of two checks generated as a result of duplicate invoices. Again, defense counsel objected as to the relevance of the proffered evidence on the basis that the checks had no connection whatsoever with the petitioner and that they were highly prejudicial insofar as they created the appearance of guilt in the petitioner by innuendo rather than by direct evidence. The prosecution's offer of proof of relevancy was that the checks would have to be admitted to be shown to the witnesses to determine whether it was their signature. The

prosecution also contended that it was necessary to show that the checks were cashed by an employee of Admiral Check Cashing by Freddie Legaspi who did not have any connection with this trial. The trial court ruled Exhibit 15 admissible, overruling the objection for the same reasons as stated with respect to Exhibit 14.

The prosecution then moved to admit Exhibit 16, which consisted of two checks stolen from Carol Gratzke's office at Cherokee Apparel. Again, defense counsel objected to their admission on the basis that they were highly prejudicial in that his client had never been shown to have any connection with the people responsible for stealing, embezzling, and/or forging this and any of the previously admitted checks in question. The trial court admitted Exhibit 16 with no explanation.

Finally, the prosecution moved to admit Exhibit 17, consisting of seven counterfeited checks, unconnected with petitioner, but for the fact they were made from the same mold. Defense counsel specifically objected. The prosecution's offer of proof consisted of argument that the proffered checks were the same type of counterfeited checks as the check the petitioner deposited to his account. The trial court admitted the seven checks into evidence.

In sum, all the foregoing exhibits had relevance only as to an individual unnamed in this action, namely, Mr. Legaspi.

CONCLUSION

A writ of certiorari should issue to determine the extent to which irrelevant evidence may form the basis of a conviction, within the meaning of *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 and *Spencer v. Texas* (1967) 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606.

Respectfully submitted,

BRUCE M. MARGOLIN
MICHAEL D. CHANEY

JOSEPH PATRICK FARNAN
Counsel of Record

Attorneys for Petitioner
BRYANT JAMES SALDIVAR

APPENDIX A

NOT TO BE PUBLISHED

NOTICE: Any party desiring a rehearing must file a petition within 15 days after the date of this opinion [Rule 27b].

Any party desiring a hearing by the Supreme Court must file a petition between 30 and 40 days after the date of this opinion [Rule 28b].

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL -
SECOND DIST.
FILED
JAN 18 1990
Robert N. Wilson Clerk

Deputy Clerk

THE PEOPLE,
Plaintiff and Respondent,
v.
BRYANT JAMES SALDIVAR,
Defendant and Appellant.

No. B039301
(Super.Ct.No. A964483)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roberta Ralph, Judge. Affirmed.

Manuel Hidalgo and Gilbert D. Sigala for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Edward T. Fogel, Jr., Senior Assistant Attorney General, and Keith H. Borjon, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty on count 2 of receiving stolen property (Pen. Code, § 496, subd. 1) and found him not guilty on counts 1 and 3 of grand theft and forgery of a fictitious check. He was sentenced to state prison for a term of 16 months. On appeal, he challenges the sufficiency of the evidence to support his conviction, claims error in the admission of evidence, and claims error in failing to instruct the jury pursuant to defense special instruction No. 6.

FACTS

A. Prosecution.

The charges against defendant arose out of his negotiation of a counterfeit check for $250,000 on August 13, 1987. The counterfeit check was payable to defendant's company, Interamerica Financial Corporation, and drawn upon the account of Cherokee Apparel. According to defendant, his company was in the mortgage brokerage business and helped people obtain loans; he had never done business with Cherokee Apparel, a clothing manufacturer.

The check negotiated by defendant was one of eight Cherokee checks counterfeited by a former Cherokee accounts payable clerk, Genefredo (Freddie) Legaspi,

who quit Cherokee's employ in late January 1987 after having worked for Cherokee since late 1983. Cherokee did not discover the counterfeit checks until mid-September 1987.

Cherokee's controller, Carol Gratzke, did not know what sort of employment Legaspi went into after he quit; when Legaspi worked at Cherokee, he had told her that he had outside employment as a real estate agent and showed her his business card; in November 1986, Cherokee had received a request for verification of employment of Legaspi, indicating that Legaspi was requesting a loan.

Cherokee later discovered that before Legaspi quit, he had changed the numbers on two old invoices formerly submitted by one of Cherokee's sewing subcontractors, J.K. Apparel, owned by Jon Lee, and resubmitted the invoices, which Cherokee had already paid, thus causing Cherokee to issue two checks in early and mid-January 1987 to Mr. Lee for some $35,000, for which no goods or services had been rendered by Lee. Legaspi was the Cherokee accountant in charge of Lee's account and could delay the issuance of Lee's checks, which Legaspi had done in the past. Lee later told police that he needed the checks to pay his employees so he participated in cashing Legaspi's checks at L.A. Quik Check, where Lee cashed his checks; Legaspi paid Lee for cashing the checks for him. Legaspi also used Lee to introduce Legaspi to people at L.A. Quik Check as the owner of Richard's Sportswear, another of Cherokee's sub-contractors.

On January 9 and 23, 1987, Legaspi used duplicate invoices of Richard's Sportswear to cause Cherokee to issue two checks payable to Richard's Sportswear for goods and services never rendered. Legaspi forged the signature of the owner of Richard's Sportswear and cashed the checks at L.A. Quik Check. In February

1987 Legaspi or a person he hired to cash checks for him, Chris Visperas, cashed at L.A. Quik Check two checks made payable to Richard's Sportswear. The checks, for about $63,000 and $73,000 respectively, had been stolen by Legaspi from Cherokee and contained forged signatures of Cherokee employees, as well as the forged signature of the owner of Richard's Sportswear.

In July and August 1987, five counterfeit Cherokee checks totaling over $345,000 were cashed by Visperas on Legaspi's behalf at L.A. Quik Check and Cherokee's bank paid on all of these checks. The model used to make the counterfeit checks was a legitimate check dated June 23, 1987 payable to J.K. Apparel.

In May, June or July 1987, Legaspi approached a Cherokee employee, Craig Cox, and asked Cox if he would cash some checks for him; Legaspi bragged to Cox that Legaspi could get checks from Cherokee and Cox could make some money by cashing the checks, but Cox refused.

Interamerica Financial Corporation, of which defendant was the president and sole shareholder, had an account at Rancho Bank in Upland with a balance of $108.03. On August 13, 1987, defendant deposited into Interamerica's account a $250,000 check drawn on Cherokee's account. Because of the amount, Rancho Bank placed a five-day hold on the check. Cherokee's bank paid the check. On August 21, defendant came into Rancho Bank and from the account withdrew $9,000 cash and purchased three cashiers [*sic*] checks totaling $26,300.

On August 26, defendant withdrew from the account $10,000 in cash and purchased two cashier's checks payable to himself for $50,000 and $125,000. On August 31, defendant withdrew $25,000 in cash from the account and also returned the August 26 cashier's check for $125,000; from that $150,000 defendant purchased

two cashier's checks for $72,000 each and obtained $6,000 in cash.

On September 3, defendant returned to Rancho Bank and had the bank wire from Interamerica's account $144,000 to the First Interstate Bank in Las Vegas. On September 4, defendant obtained the funds in cash from the First Interstate Bank; Judy Hornbuckle, the Assistant Vice-President of the bank, stated that such a transaction was not an unusual one for her bank, a block from the strip, but people usually have a security guard from one of the casinos with them. Defendant put the money in his briefcase. Hornbuckle followed defendant to the lobby door and saw him get into a four-door sedan with three other men with dark complexions who appeared to Hornbuckle to be either Asian or Hispanic; the car took off rapidly. Hornbuckle remembered that earlier in September defendant came to her bank seeking to cash a cashier's check for a large amount of money; she explained to him that she could not cash the check because he was not a Nevada resident and that if he wanted to cash the check he could have his bank in California wire the money there.

In mid-September, Cherokee received its August bank statement, noticed that there were duplicate check numbers, and began an investigation that revealed six counterfeit checks as well as the checks issued upon duplicate and fraudulent invoices submitted by Legaspi and the two stolen checks with signatures forged by Legaspi.

On September 21, 1987, Chris Visperas, Legaspi's messenger, was arrested at L.A. Quik Check attempting to cash a counterfeit Cherokee check payable to Richard's Sportswear for $79,850. Defendant was arrested pursuant to a warrant on February 4, 1988. Legaspi, who had fled to the Philippines, was arrested in

July 1988 when he left the Philippines and attempted to go to Hawaii.

After his arrest, defendant waived his rights and told the police that he received the check in the mail on August 14 or 15; he thought it was a joke or an advertisement and was at the same time surprised and afraid; he thought the check was a loan, but did not know from whom; he threw away the envelope the check came in; a lot of people knew his company was about to fail; he called Cherokee's bank in Colorado and was told that the check was good; he called Cherokee and someone whose name he could not supply to the police told him that the check was good; two weeks after he obtained the $144,000 in Las Vegas, the money was stolen from his briefcase inside his car parked near the Capital Records building in Hollywood; he did not report the burglary or theft to the police. Defendant denied knowing Legaspi, Lee, or Visperas.

B. Defense.

After defendant's arrest, he was released; on February 11, defendant attempted to close the account at Rancho Bank and withdraw the remaining balance of about $4,220; the bank refused, as there was a restraint on the account.

For the defense, defendant testified that his company was going downhill and in July 1987 it was ready to close down; when he got the check in the mail, he was surprised and confused; the envelope containing the check had no return address; he called Cherokee and a woman told him that the check was his; he called Cherokee's bank in Denver and was told that the check was good; he deposited the check into his account; he did not know it was counterfeit; he went to Las Vegas to buy foreclosure properties, which requires cash; after he

got the cash, he changed his mind about buying properties and decided to establish residency in Nevada and then buy properties there; about September 18, the $144,000, along with some other monies he had in his briefcase, was stolen from his Camaro in Hollywood; he waved down a police patrol car that was driving by and told them that someone had broken into his car; while the police were asking him what happened, the police radio went off and they told him to keep his things secure and then they left.

On cross-examination, defendant stated that he was three courses short of a master's degree in business and had years of experience in the financial community and worked with lenders in his job; he admitted that he had never done business with Cherokee, but after calling Cherokee he concluded the $250,000 belonged to him; as to his statement to the police that the money might have been a loan, he admitted that he was not aware of any type of loan where the borrower does not know the lender; he also admitted that if his bank had mistakenly deposited $250,000 into his account, he would know the bank had made a mistake and he would not have the right to spend the money. Defendant stated that he spent the money in this case because he had made good efforts to contact the people at Cherokee and "I had intent to invest that money in real estate until I can — until I was able to confirm or disconfirm whether or not that money should be returned." Defendant admitted, however, that he used most of the money to pay debts, his own back wages, and for other personal affairs.

Defendant also testified that after leaving the bank in Las Vegas with the money he got into a taxi with a driver and another passenger he had met at Circus Circus; they had decided to double up on the taxi to the airport and save on the fare; after stopping at the bank, they went to the airport and he flew back to Los

Angeles; on the day the money was stolen, he was in Hollywood to see a client; afterwards he went to the movies and the money was stolen when he was at the movies; he assumed that the burglary involved "drug individuals" and did not attempt to report it to the police. Defendant denied being in Hollywood to give Legaspi his share of the money; he denied knowing Legaspi or that Legaspi was a real estate agent for E.R.A. Realty on Sunset Boulevard, near Capital Records.

I

SUFFICIENCY OF THE EVIDENCE

Challenging the sufficiency of the evidence to support his conviction for receiving stolen property, appellant makes three contentions: (1) "The counterfeited check . . . was not stolen within the meaning of Penal Code section 496, subdivision 1," (2) "There is no evidence to support a finding that [appellant] had knowledge that the check . . . was stolen," and (3) "[appellant's] testimony indicates that he had no knowledge of the nature of the check he cashed and in fact made good faith attempts to ascertain its origin."

In order to establish the commission of the crime of receiving stolen property it must be established by substantial evidence that the particular property was stolen, that the accused received, concealed or withheld it from the owner thereof, and that the accused knew the property was stolen. (*In re Richard T.* (1978) 79 Cal.App.3d 382, 387.) The standard which is applied in weighing the sufficiency of evidence is not whether guilt was proved beyond a reasonable doubt but whether there is substantial evidence in support of the findings of the trier of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695.)

Appellant's first contention appears to relate to the first element of the crime of receiving stolen property — that the property be stolen. He claims, in effect, that it is a legal impossibility to be convicted of this crime when the check is *counterfeit* as opposed to stolen. However, it is not the counterfeit check that appellant was accused of receiving; the information identifies the property as "Money" and it is the $250,000 which he received after negotiating the counterfeit check which is the stolen property within the meaning of Penal Code section 496, subdivision 1. The counterfeit check was merely the means used to withdraw $250,000 from Cherokee's account. "Anything that can be the subject of theft can also be property under section 496." (*People v. Gopal* (1985) 171 Cal.App.3d 524, 541.)

Substantial evidence supports the finding that the $250,000 was stolen. Defendant himself admitted that his company never had done business with Cherokee; he had done nothing to earn the $250,000. Whether he knew the check was counterfeit, legitimate, or embezzled is not the issue; the issue is whether the money was stolen, and substantial evidence supports the finding that it was. Moreover, substantial evidence supports the finding that it was appellant who stole the money by negotiating the check. Although appellant may be charged with both theft and receiving stolen property, he may not, with exceptions not applicable here, be convicted of theft and of receiving, withholding or concealing the same stolen property. (*People v. Jackson* (1978) 78 Cal.App.3d 533, 538. Pursuant to *People v. Jaramillo* (1976) 16 Cal.3d 752, 758, the jury in the instant case was instructed that "as to Count 1 (grand theft), and count 2, (receiving stolen property), if you find him guilty as charged in either of these two counts you must find him not guilty of the other of these two counts. Under the law the defendant may not be found

guilty of both theft and receiving stolen property at the same time."

It was for the jury to determine whether appellant was more appropriately guilty as a thief or as a non-thief of receiving stolen property. (*See People v. Jaramillo, supra*, 16 Cal.3d at p. 758.) The fact that the jury convicted appellant of receiving stolen property and acquitted him of theft might indicate that the jury did not find that he had the specific intent to permanently deprive Cherokee of the money, but it is not conclusive on the issue. (*id.*, at p. 759, fn. 7), as a guilty verdict on count 1 may have been foreclosed pursuant to the jury instructions. Further, because proof of the crime of receiving stolen property does not require the state to prove affirmatively that the thief was someone other than the defendant (*People v. Hansard* (1966) 245 Cal.App.2d 691, 696-697), the evidence is *not* insufficient as to the conviction for receiving stolen property simply because our record may be inconclusive as to the jury's finding on the issue of the thief's identity.

Assuming the identity of the thief is Legaspi, appellant claims that the instant conviction cannot stand "inasmuch as no jury instruction was ever given to include theft by embezzlement." There was no evidence presented in this case that the theft of the $250,000 was accomplished by embezzlement; the contention is without merit.

Because appellant erroneously focuses on the counterfeit check rather than the *money* as the stolen property in this case, we find without merit his second and third contentions pertaining to the knowledge element of the crime of receiving stolen property. Possession of stolen property, accompanied by no explanation or unsatisfactory explanation, or by suspicious circumstances, will justify an inference that the goods were received with

knowledge that they had been stolen. (*In re Richard T., supra*, 79 Cal.App.3d at p. 388.)

Substantial evidence supports the finding that appellant knew the money was stolen because he offered unsatisfactory explanations for his conduct with respect to the check and he himself admits the circumstances were suspicious: He admitted that he had questions as to whether the check was "real"; he admitted that although he made inquiries as to whether the check was good — *i.e.*, whether there were sufficient funds to pay the check — he did not return the check or tell Cherokee that there had been a mistake; he admitted that if his bank had similarly mistakenly credited his account with $250,000, he would know that he had no right to the money. The jury was entitled to disbelieve his story and he thought the check was a loan inasmuch as he did not know the lender and such a belief would be preposterous given his education and experience with lenders in his business dealings. We conclude that substantial evidence supports the verdict.

II

NO ERROR IN ADMISSION OF EVIDENCE

Appellant contends that the court abused its discretion in admitting into evidence the other forged, stolen, and counterfeit checks, as well as testimony concerning them. He claims such evidence was irrelevant and even if relevant, it was more prejudicial than probative. He also claims that the court never engaged in the weighing process required under Evidence Code section 352.

"Relevant evidence is evidence having *any* tendency in reason to prove or disprove a disputed fact properly at issue." (*People v. Edelbacher* (1989) 47 Cal.3d 983,

1015.) Relevancy is not restricted to a precise factual issue alone, but applies equally when it tends to establish a fact from which the existence of another fact in issue can be directly inferred. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 347.)

Appellant's argument that the other checks in this case had nothing to do with him is an argument going to the weight of the evidence and not its admissibility. Evidence of how Legaspi stole, forged, and counterfeited the other checks, and his practice of enlisting the aid of others in cashing the checks is probative on the issue of appellant's guilt. From such evidence, the jury could reasonably infer that Legaspi's practice was to try to have someone else negotiate the check for him; that after Jon Lee refused to continue, Legaspi enlisted the aid of Chris Visperas and solicited Craig Cox, who apparently refused. It is thus reasonable to infer that Legaspi similarly solicited appellant and that appellant knew the check he negotiated, whether counterfeit or forged, was from Legaspi. We conclude that the trial court did not abuse its discretion in determining the evidence was relevant.

We find without merit appellant's claim that the trial court did not engage in the process of weighing the probative value and prejudicial effect of the "other checks" evidence. The trial court expressly referred to Evidence Code section 352, and listened to arguments on both sides before expressly stating that the evidence was more probative than prejudicial.

Appellant also fails to show the trial court abused its discretion. "The trial court is vested with wide discretion in determining the admissibility of evidence. Its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse, *i.e.*, unless the prejudicial effect of the evidence clearly outweighs its probative value." (*People v. Karis* (1988)

46 Cal.3d 612, 637.) The "prejudice" referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*Id.*, at p. 638.)

The evidence of the other checks clearly does not evoke an emotional bias against the defendant; in fact it carries with it no "prejudice" within the meaning of section 352. Such evidence, however, was potentially damaging for the defense case if the jury inferred from such evidence a connection between Legaspi and the defendant and from such connection made the inference that the defendant knew the check was counterfeit and the funds were thereby stolen from Cherokee's account. Obviously, all evidence which tends to prove guilt is damaging to the defendant's case; however such damage is not synonymous with the prejudice which Evidence Code section 352 is designed to avoid. (*People v. Karis, supra*, 46 Cal.3d 612, 638.)

We conclude that appellant has failed to show error in the admission of evidence of the other checks.

III

DEFENSE SPECIAL INSTRUCTION NO. 6

Appellant contends that the trial court erred in refusing to instruct the jury with defense special instruction No. 6, which pertained to a defense to the charge of *theft* based on the defendant's good faith belief that he has a right to take the property of another. As appellant was not convicted of theft, and the instruction on its face deals with the special intent required for a conviction of theft, it has no bearing on his conviction for receiving stolen property, a general intent crime. The contention lacks merit.

DISPOSITION

The judgment is affirmed.

LILLIE, P.J.

We concur:

JOHNSON, J.

WOODS (Fred), J.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE
COURT OF APPEAL

Second Appellate District,
Division Seven, No. B039301

S014329
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 18 1990
Robert Wandruff Clerk

THE PEOPLE, Respondent

v.

BRYANT JAMES SALDIVAR, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice